No. 1109

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM S. GIRARD,

PETITIONER

HABEAS CORPUS
NO. 47-57

CHARLES E. WILSON, ET AL.,

RESPONDENTS

MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

SIMULTANEOUS WITH THE SIGNING OF THE TREATY OF PEACE OF SEPTEMBER 8, 1951, A SECURITY TREATY WAS ENTERED INTO BETWEEN THE UNITED STATES AND JAPAN. IT CONSISTS OF FIVE PARAGRAPHS. IT RECITES THAT AT THE REQUEST OF JAPAN AND FOR ITS DEFENSE, THE UNITED STATES AGREES TO MAINTAIN CERTAIN OF ITS ARMED FORCES IN JAPAN. ARTICLE 3 READS: "THE CONDITION WHICH SHALL GOVERN THE DISPOSITION OF ARMED FORCES OF THE UNITED STATES OF AMERICA IN AND ABOUT JAPAN SHALL BE DETERMINED BY ADMINISTRATIVE AGREEMENTS BETWEEN THE TWO GOVERNMENTS." (UNDERLINING SUPPLIED.)

THE WORD "DISPOSITION" AS GENERALLY UNDERSTOOD AND AS DEFINED IN ALL DICTIONARIES MEANS ARRANGEMENT, ALLOCATION, PLACEMENT, EMPLOYMENT, USE, ETC. NOWHERE IS IT DEFINED TO INCLUDE STATUS OR OTHER MEANINGS WHICH THE RESPONDENTS ATTRIBUTE TO IT.

RELYING ON THE WORDING OF ARTICLE 3 OF THE SECURITY PACT, "AN ADMINISTRATIVE AGREEMENT" WAS ENTERED INTO ON FEBRUARY 28, 1952 WHEREIN IT WAS PROVIDED, AMONG OTHER THINGS, THAT THE UNITED STATES SHALL HAVE EXCLUSIVE CRIMINAL JURISDICTION OVER ALL OFFENSES WHICH MAY BE COMMITTED IN JAPAN BY MEMBERS OF THE ARMED FORCES, THE CIVILIAN COMPONENTS THEREOF AND OVER CERTAIN DEPENDENTS (ARTICLE XVII). IT WAS FURTHER PROVIDED THAT AT A LATER DATE THE UNITED STATES WOULD CONCLUDE WITH JAPAN, AT THE OPTION OF JAPAN, ANOTHER AGREEMENT ON CRIMINAL JURISDICTION SIMILAR TO THE NATO STATUS OF FORCES TREATY.

ON OR ABOUT SEPTEMBER 29, 1953, MR. ALLISON, ACTING ON BEHALF OF THE UNITED STATES, ENTERED INTO A SO-CALLED PROTOCOL TO AMEND THE ADMINISTRATIVE AGREEMENT OF FEBRUARY 28, 1952 AND THEREBY SOUGHT TO CHANGE ENTIRELY (NOT AMEND) THE CRIMINAL JURISDICTION WHICH THE UNITED STATES HAD THERETOFORE EXERCISED OVER ITS ARMED FORCES IN JAPAN.

A PROTOCOL IS DEFINED IN THE DICTIONARY AS AN ORIGINAL DRAFT OR A WORD USED IN DIPLOMATIC PARLANCE AS A "PRELIMINARY MEMORANDUM, AS OF RESOLUTIONS ARRIVED AT IN NEGOTIATIONS, OFTEN SIGNED BY THE NEGOTIATORS, AS A BASIS FOR A FINAL CONVENTION OR TREATY".

THERE IS NOTHING IN THE SECURITY TREATY OF SEPTEMBER 8, 1951 OR THE ADMINISTRATIVE AGREEMENT OF FEBRUARY 28, 1952 ALLEGEDLY MADE PURSUANT TO ARTICLE 3 OF THE SECURITY TREATY, WHICH PERMITS OR AUTHORIZES MR. ALLISON OR ANY OTHER PERSON ACTING ON BEHALF OF THE UNITED STATES TO WHITTLE AWAY OR SURRENDER JURISDICTION WHICH THE UNITED STATES HAD BEEN EXERCISING OVER ITS OWN MILITARY FORCES IN JAPAN. THERE IS A STATEMENT IN ARTICLE XVII OF THE ADMINISTRATIVE AGREEMENT THAT THE UNITED STATES WILL CONCLUDE WITH JAPAN AN AGREEMENT ON CRIMINAL JURISDICTION SIMILAR TO THE NATO STATUS OF FORCES TREATY, BUT THE FACT REMAINS THAT NO SUCH AGREEMENT WAS EVER ENTERED INTO. THE PROTOCOL WAS MERELY THE PRELIMINARY NEGOTIATIONS. FURTHERMORE THE CONGRESS OF THE UNITED STATES MADE SPECIFIC RESERVATIONS IN THE NATO STATUS OF FORCES TREATY, ONE OF WHICH WAS THAT SAID AGREEMENT WOULD NOT BE APPLICABLE IN ANY CASE WHERE THE CONSTITUTIONAL RIGHTS OF THE ACCUSED MEMBER OF OUR ARMED FORCES MAY BE DIMINISHED, DENIED OR DESTROYED. THERE WAS THE ADDITIONAL RESERVATION OR PROVISO WHICH THE SENATE IMPOSED, NAMELY THAT THE NATO AGREEMENTS WERE NOT TO BE A PRECEDENT FOR FURTHER AGREEMENTS. THIS WAS A DIRECT MANDATE BY THE SENATE, WHICH BODY IS CHARGED UNDER THE CONSTITUTION WITH THE DUTY OF MAKING LAWS FOR THE PEOPLE OF THE UNITED STATES, THAT THE SO-CALLED NATO STATUS OF FORCES AGREEMENT WOULD NOT BE EXTENDED TO OTHER COUNTRIES. ONLY IN THE CASE OF THE NATO NATIONS WAS THE SENATE WILLING TO RELINQUISH JURISDICTION.

THE SENATE'S ACTION CONFERRING JURISDICTION OVER OFF DUTY OFFENSES TO THE VISITED NATO COUNTRY INDICATES ITS UNDERSTANDING OF INTERNATIONAL LAW THAT OUR ARMY WAS NOT SUBJECTED TO THE JURISDICTION OF THE FOREIGN NATION. HAD JURISDICTION EXISTED IN THE FOREIGN COUNTRY AS THE RESPONDENTS HERE CONTEND, THERE WOULD HAVE BEEN NO NEED TO CONFER JURISDICTION.

THE POSITION WHICH THE GOVERNMENT HAS TAKEN THAT UNDER INTERNATIONAL LAW A VISITING FORCE IS SUBJECT TO THE JURISDICTION OF THE NATION IN WHICH IT IS STATIONED, IS WRONG. THAT IS NOT THE LAW, THE SENATE DID NOT THINK IT WAS THE LAW AND THE SCHOONER CASE ON WHICH RESPONDENTS RELY DOES NOT SUPPORT THE POSITION. (SEE DISCUSSION ON THIS SUBJECT HEREINAFTER SET FORTH.)

THE PROTOCOL OF SEPTEMBER 29, 1953 WAS IN DISREGARD OF THE RESERVATIONS WHICH THE SENATE OF THE UNITED STATES DIRECTED BE FOLLOWED WHEN IT APPROVED, BY A CLOSE VOTE, THE NATO STATUS OF FORCES TREATY. THE PROTOCOL, ASIDE FROM ITS ILLEGALITY AND UNCONSTITUTIONALITY (A SUBJECT HEREINAFTER REFERRED TO), HAS NO LEGAL VALIDITY ON OTHER GROUNDS: FIRST, BECAUSE IT IS NOT AN AGREEMENT, BUT MERELY A STATEMENT OR PRELIMINARY MEMORANDUM OF NEGOTIATIONS WHICH WERE TO BE THE BASIS OF A FINAL AGREEMENT. SECOND, BECAUSE THE NEGOTIATOR WHO SIGNED ON BEHALF OF THE UNITED STATES EXCEEDED THE PROVISIONS OF ARTICLE XVII OF THE ADMINISTRATIVE AGREEMENT, WHICH THE RESPONDENTS ASSERT IS THE SOURCE OF THE AUTHORITY FOR THE PROTOCOL AND THIRD BECAUSE IT WAS NOT AUTHORIZED OR RATIFIED BY THE UNITED STATES SENATE.

FOR THE PURPOSE OF THE ARGUMENT WHICH FOLLOWS AND FOR NO OTHER, THE PETITIONER WILL ASSUME THAT THE PROTOCOL OF SEPTEMBER 29, 1953 MAY BE VIEWED AS A VALID AGREEMENT. IT GRANTED TO JAPAN CERTAIN CRIMINAL JURISDICTION WITH THE EXPRESS RESERVATION THAT THE MILITARY AUTHORITIES OF THE UNITED STATES SHALL HAVE THE PRIMARY RIGHT TO EXERCISE JURISDICTION OVER MEMBERS OF THE UNITED STATES ARMED FORCES AND THE CIVILIAN COMPONENTS THEREOF WITH RESPECT TO (I) OFFENSES SOLELY AGAINST THE PROPERTY OR SECURITY OF THE UNITED STATES OR OFFENSES SOLELY AGAINST THE SECURITY OR PROPERTY OF ANY MEMBER OF THE UNITED STATES ARMED FORCES OR CIVILIAN COMPONENTS OR OF A DEPENDENT (II) OFFENSES ARISING OUT OF ANY ACT OR OMISSION DONE IN THE PERFORMANCE OF OFFICIAL DUTY." IT WAS FURTHER PROVIDED THAT "IF THE STATE WHO HAD THE PRIMARY RIGHT DECIDES NOT TO EXERCISE JURISDICTION IT SHALL NOTIFY THE AUTHORITIES OF THE OTHER STATE AS SOON AS PRACTICAL. THE AUTHORITIES OF THE STATE HAVING THE PRIMARY RIGHT SHALL GIVE SYMPATHETIC CONSIDERATION TO A REQUEST FROM THE AUTHORITIES OF THE OTHER STATE FOR A WAIVER OF ITS RIGHT IN CASES WHERE THAT OTHER STATE CONSIDERS SUCH WAIVER TO BE OF PARTICULAR IMPORTANCE".

AS PART OF THE PROTOCOL ARE CERTAIN "AGREED OFFICIAL MINUTES REGARDING PROTOCOL" OF SEPTEMBER 29, 1953. IT APPEARS THAT THE NEGOTIATORS SOUGHT TO INCORPORATE SAME BY REFERENCE. THE "AGREED OFFICIAL MINUTES" PROVIDE "WHEN A MEMBER OF THE UNITED STATES ARMED FORCES OR THE CIVILIAN COMPONENT IS CHARGED WITH AN OFFENSE, A CERTIFICATE ISSUE BY OR ON BEHALF OF HIS COMMANDING OFFICER STATING THAT THE ALLEGED OFFENSE, IF COMMITTED BY HIM, AROSE OUT OF AN ACT OR OMISSION DONE IN THE PERFORMANCE OF OFFICIAL DUTY, SHALL, IN ANY JUDICIAL PROCEEDING, BE SUFFICIENT EVIDENCE OF THE FACT UNLESS THE CONTRARY IS PROVIDED".

EVEN WHEN ALL THE ABOVE DOCUMENTS WERE SIGNED, SEALED AND DELIVERED, THERE WAS STILL LACKING AN AGREEMENT OR PROVISION REQUIRING ONE NATION TO DELIVER ITS NATIONALS TO THE OTHER NATION FOR TRIAL, NOR WAS ANY MACHINERY OR PROCEDURE ESTABLISHED FOR TRANSFER OF SUCH NATIONALS SUCH AS IS NORMALLY CONTAINED IN EXTRADITION TREATIES. A NEW AND NOVEL SOURCE OF LAW WAS THEN EVOLVED. IT IS CALLED 'AGREED VIEWS' PUBLISHED IN A.F.F.E. PAMPHLET 27-1. IT IS THE ALLEGED FUNCTION OF THE AGREED VIEWS TO INTERPRET THE SEVERAL LOOSELY DRAWN DOCUMENTS TO WHICH REFERENCE IS HEREINABOVE MADE. THIS WAS ONLY THEORY FOR, IN FACT THE RESPONDENTS NOW LOOK TO THE 'AGREED VIEWS' AS SOME SORT OF LEGISLATION OR NEW KIND OF AGREEMENT TO CARRY OUT THE SERIES OF BOOT-LIFTING OPERATIONS DESIGNED TO SURRENDER JURISDICTION. ALL THESE ACTS THEY ASSERT, WERE AUTHORIZED BY THE WORDS DISPOSITION OF ARMED FORCES CONTAINED IN ARTICLE I,I OF THE SECURITY TREATY MADE ON SEPTEMBER 8, 1951.

NO-ONE WOULD DENY BUT THAT THIS IS A STRANGE AND NOVEL WAY OF MAKING LAW BINDING ON AMERICAN CITIZENS AND TOUCHING UPON VITAL AND CONSTITUTIONAL RIGHTS OF THOSE WHO SERVE IN THIS NATION'S ARMED FORCES. WERE THIS PRACTICE TO BE SANCTIONED BY THE COURTS AS PROPER AND DONE WITHIN THE FRAMEWORK OF THE UNITED STATES CONSTITUTION, THEN THE ROAD UPON WHICH WE HAVE EMBARKED MAY WELL RESULT IN THE ABOLITION OF THE CONSTITUTION ITSELF.

AT THE HEARING BEFORE THE SUB-COMMITTEE OF THE COMMITTEE ON ARMED SERVICES, UNITED STATES SENATE, IN THE CASE OF WILLIAM S. GIRARD, HELD ON JUNE 5, 1957, THE COMMITTEE MEMBERS (TWO UNITED STATES SENATORS) EXPRESSED GRAVE DOUBT AS TO THE VALIDITY AND CONSTITUTIONALITY OF THE WHOLE SERIES OF ACTS TO WHICH REFERENCE IS HEREINABOVE MADE. (SEE EXHIBIT I ATTACHED).

AT THE SAME HEARING IT WAS DISCLOSED THAT THE UNITED STATES MADE A PURELY POLITICAL DECISION TO TURN GIRARD OVER TO THE JAPANESE AUTHORITIES FOR TRIAL AND THAT IT WAS DONE BECAUSE OF PUBLIC CLAMOR IN JAPAN. THE HEARING FURTHER REVEALED THAT THE UNITED STATES MAINTAINED THROUGHOUT THE NEGOTIATIONS WITH THE JAPANESE THAT IT WAS RIGHT ON THE LAW AND THE FACTS AND THAT GIRARD'S ACT WAS DONE IN THE COURSE OF ASSIGNED MILITARY DUTY. THE UNITED STATES FINALLY MADE THE POLITICAL DECISION TO GIVE IN TO THE JAPANESE BUT IT WAS NOT DONE AS THE ~~PROPOSAL~~ Protocol PROVIDED. IT WAS DEMONSTRATED AT THIS SENATE HEARING THAT THE FINAL DECISION AS TO WHO SHALL EXERCISE JURISDICTION IS VESTED SOLELY IN JAPAN IF THE PROCEDURE FOLLOWED IN THE GIRARD CASE IS TO BE CONSIDERED A PRECEDENT. ANOTHER ASTOUNDING FACT WAS BROUGHT TO LIGHT, NAMELY THE DEFENSE DEPARTMENT MADE THE POLITICAL DECISION AND NOT THE STATE DEPARTMENT, WHICH

DEPARTMENT IS THE BRANCH OF GOVERNMENT ALONE CHARGED BY LAW WITH THE DUTY OF CONDUCTING THIS NATION'S AFFAIRS WITH FOREIGN COUNTRIES. THE WHOLE SERIES OF ILLEGAL ACTS AND THE MUMBO-JUMBO ACTS BY WHICH THE EXECUTIVE BRANCH OF THE GOVERNMENT NOW SEEKS TO CREATE A TREATY OBLIGATION IS ALSO REVEALED IN THE RECORD OF THE SENATE COMMITTEE HEARING ON THIS CASE.

THE GOVERNMENT HAS EXPRESSED ITS POSITION WITH RESPECT TO THESE MATTERS IN UNEQUIVOCAL TERMS IN PARAGRAPH 7 OF THEIR ANSWER OR RETURN. IT IS THERE SAID, "7 - THE DECISION BY THE UNITED STATES NOT TO EXERCISE JURISDICTION IN THIS CASE IS A DISCRETIONARY DECISION OF THE EXECUTIVE BRANCH IN THE CONDUCT OF FOREIGN AFFAIRS AND THE MILITARY DEFENSE OF THE UNITED STATES, AND AS SUCH IS A POLITICAL DECISION NOT SUBJECT TO JUDICIAL REVIEW."

IF JURISDICTION IN CRIMINAL CASES MAY BE VESTED BY THE EXERCISE OF AN ASSERTED, NEBULOUS DISCRETIONARY POWER OF THE EXECUTIVE BRANCH (IN THIS CASE THE MILITARY AUTHORITIES AND NOT THE STATE DEPARTMENT OFFICIALS EXERCISED THE CLAIMED POWER), THEN WE ARE FAR REMOVED FROM THE BASIC CONCEPTS OF THE AMERICAN FORM OF GOVERNMENT. WHAT CLAUSE IN THE CONSTITUTION MAY BE SAID AUTHORIZES DISCRETIONARY POLITICAL POWER TO DETERMINE CRIMINAL JURISDICTION OVER AN AMERICAN CITIZEN AND WHAT ARE THE BOUNDS OF SUCH DISCRETION. THERE IT IS SAID TO HAVE BEEN EXERCISED TO SATISFY THE PUBLIC CLAMOR OF THE JAPANESE PEOPLE. (EXHIBIT 1) BUT SINCE WHEN HAS THE BACKBONE OF THE EXECUTIVE BRANCH BEEN SO WEAKENED THAT WE SUBROGATE THE RULE OF LAW TO THE CONVENIENCES OF THAT BRANCH OF THIS GOVERNMENT AND FROM WHENCE DOES THAT RIGHT STEM. THIS IS THE ISSUE IN THIS CASE AND NOT THE "CRY-BABY" CLAIM THAT THE JAPANESE GOVERNMENT WOULD BE MORE LENIENT WITH OUR MILITARY MEN WHO COMMIT OFFENSES THAN WOULD THE UNITED STATES GOVERNMENT. IT IS NOT LENIENCY WHICH GIRARD SEEKS BUT JUSTICE UNDER LAW AND WITHIN THE RULES OF LAW AS WE KNOW THEM AND NOT AS THE JAPANESE HAVE INTERPRETED THEM FOR US. MR. DECKERT'S TESTIMONY ON THIS SUBJECT BEFORE THE SENATE COMMITTEE IS ENLIGHTENING BUT MOST DISHEARTENING.

ALL OF THE WORDS OF THE SUPREME COURT OF THE UNITED STATES IN THE RECENT REID DECISION. THE QUOTATION FROM LORD COKE, MADE CENTURIES AGO, COMES AS A REFRESHING RAY OF LIGHT IN THE PRESENT DAY, WHEN A GOVERNMENT OF THE PEOPLE OPENLY STATES THAT IT SACRIFICED ONE OF ITS CITIZENS FOR CONVENIENCE AND THAT IT HAS THE UNFETTERED DISCRETIONARY POWER TO DO SO. THE GREAT EMINENT JURIST LORD COKE SAID, GOD SEND ME NEVER TO LIVE UNDER THE LAW OF CONVENIENCY OR DISCRETION.

THE SUPREME COURT OF THE UNITED STATES IN THE RECENT REID DECISION CONDEMNED AGREEMENTS OF THE NATURE INVOLVED IN THIS CASE AND STATED,

"THE UNITED STATES IS ENTIRELY A CREATURE OF THE CONSTITUTION. ITS POWER AND AUTHORITY HAVE NO OTHER SOURCE. IT CAN ONLY ACT IN ACCORDANCE WITH ALL THE LIMITATIONS IMPOSED BY THE CONSTITUTION. WHEN THE GOVERNMENT REACHES OUT TO PUNISH A CITIZEN WHO IS ABROAD, THE SHIELD WHICH THE BILL OF RIGHTS AND OTHER PARTS OF THE CONSTITUTION PROVIDE TO PROTECT HIS LIFE AND LIBERTY SHOULD NOT BE STRIPPED AWAY JUST BECAUSE HE HAPPENS TO BE IN ANOTHER LAND".

ASIDE FROM THE UNCONSTITUTIONALITY AND ILLEGALITY OF THE SEVERAL DOCUMENTS UPON WHICH RESPONDENTS RELY FOR THEIR SOURCE OF AUTHORITY TO TRANSFER THE BODY OF GIRARD TO THE JAPANESE GOVERNMENT FOR TRIAL, AN EXAMINATION OF THE TEXT OF SAID DOCUMENTS REVEALS THAT NO SUCH AUTHORITY WAS GRANTED AND THE RESPONDENTS ARE ACCORDINGLY WITHOUT POWER TO ACT.

ASSUMING THE DOCUMENTS TO BE LEGAL IT APPEARS THAT THE ADMINISTRATIVE AGREEMENT OF FEBRUARY 28, 1952 AND THE PRELIMINARY NEGOTIATIONS REFERRED TO AS THE PROTOCOL OF SEPTEMBER 29, 1953 AND THE OFFICIAL MINUTES INCORPORATED THEREIN CONFERS PRIMARY JURISDICTION IN THE UNITED STATES. JAPAN AGREED THAT THE UNITED STATES SHALL HAVE THE RIGHT TO EXERCISE JURISDICTION OVER THE MEMBERS OF ITS ARMED FORCES AND THAT IF THE OFFENSE AROSE OUT OF ANY ACT OR OMISSION DONE IN PERFORMANCE OF OFFICIAL DUTY THAT THE UNITED STATES WOULD HAVE PRIMARY JURISDICTION. JAPAN ALSO AGREED THAT WHEN A MEMBER OF THE UNITED STATES ARMED FORCES IS CHARGED WITH AN OFFENSE, A CERTIFICATE BY HIS COMMANDING OFFICER STATING THAT THE ACT AROSE OUT OF THE PERFORMANCE OF OFFICIAL DUTY SHALL IN ANY JUDICIAL PROCEEDING BE SUFFICIENT EVIDENCE OF THE FACT UNLESS THE CONTRARY IS PROVED. JAPAN FURTHER AGREED THAT EACH STATE WOULD GIVE "SYMPATHETIC CONSIDERATION" TO A REQUEST FOR A WAIVER OF PRIMARY JURISDICTION BUT THERE NEVER WAS ANY AGREEMENT THAT IT HAD TO BE GIVEN AND THERE IS NO LAW OR RULE ANYWHERE WHICH VESTS POWER IN THE UNITED STATES AUTHORITIES TO GRANT A WAIVER OR TO ACCEDE TO JAPAN'S REQUEST. JAPAN PRESSED ON AND THE MATTER NEVER REACHED THE HIGH OFFICIALS OF GOVERNMENT AS MADE AND PROVIDED IN THE AGREEMENTS. JUNIOR OFFICIALS FINALLY SURRENDERED. (SEE EXHIBIT 1) HOWEVER UNLESS THERE IS A STATUTE OR A VALID TREATY AGREEMENT, WHICH UNDER OUR CONSTITUTIONAL SYSTEM CONSTITUTES A LAW WHICH VESTS POWER IN THE EXECUTIVE TO DELIVER AMERICAN CITIZENS TO A FOREIGN GOVERNMENT, HE MAY NOT DO SO NOR DOES HE HAVE ANY DISCRETION IN THE MATTER. (VALENTINE V. UNITED STATES 299 U.S.5).

CONTRARY TO THE CONTENTION OF RESPONDENTS' COUNSEL MADE AT THE HEARING ON JUNE 11, 1957 THAT WE WOULD BE BREACHING OUR AGREEMENT WITH JAPAN IF WE DID NOT DELIVER GIRARD TO IT FOR TRIAL, IT IS THE JAPANESE GOVERNMENT WHO IS BREACHING THE PACT BY ITS ASSERTION OF RIGHTS WHICH UNDER THE ADMINISTRATIVE AGREEMENT AND THE PROTOCOL IT DID NOT HAVE.

IN THIS CASE A CERTIFICATE OF OFFICIAL DUTY WAS ISSUED BY GIRARD'S COMMANDING OFFICER STATING THAT GIRARD WAS ACTING IN THE PERFORMANCE OF OFFICIAL DUTY AND THAT THE OFFENSE COMPLAINED OF AROSE OUT OF THE PERFORMANCE OF THAT DUTY (PETITIONER'S EXHIBIT IN EVIDENCE #1). THESE FACTS WERE LIKEWISE STIPULATED BY COUNSEL FOR THE RESPONDENTS ON THE RECORD IN THE HEARING ON THE PETITION FOR THE WRIT HELD ON JUNE 11TH. IT IS UNDISPUTED THAT GIRARD WAS ON GUARD DUTY AND ASSIGNED TO PROTECT UNITED STATES PROPERTY IN A MILITARY AREA AND THAT THERE WERE POSTS WARNING TRESPASSERS AWAY FROM THE PREMISES. THE WARNING SIGNS READ SUBSTANTIALLY AS FOLLOWS: "STOP. YOU ARE VIOLATING THE JOINT ADMINISTRATIVE AGREEMENT BETWEEN THE UNITED STATES AND JAPAN BY ENTERING THIS AREA. OFFENDERS WILL BE APPREHENDED AND TAKEN TO THE JAPANESE POLICE FOR PROSECUTION IN ACCORDANCE WITH THIS AGREEMENT." (EXHIBIT 11)

THAT THE DECEASED TRESPASSED ON TO THE UNITED STATES MILITARY RESERVATION FOR THE PURPOSE OF TAKING PROPERTY WHICH BELONGED TO THE UNITED STATES IS ADMITTED, THAT FOR THE PURPOSE OF SCARING HER AND OTHERS OFF, GIRARD FIRED AN EXPENDED CARTRIDGE CASE AS A WARNING IS ALSO ADMITTED. THESE FACTS AND ALL OTHERS, MOST FAVORABLE TO THE PETITIONER, MUST BE CONSIDERED AS FACTS BY THE COURT SINCE THE PETITIONER WAS NOT PRODUCED AS PROVIDED FOR BY THE UNITED STATES JUDICIARY CODE.

UNDER THE PROTOCOL AS WELL AS UNDER INTERNATIONAL LAW AND THE LAWS OF THE UNITED STATES, THE ALLEGED OFFENSE IS ONE OVER WHICH THE UNITED STATES HAS JURISDICTION. THE EXECUTIVE BRANCH OF THE GOVERNMENT WAS THEREFORE WITHOUT POWER TO WAIVE AWAY ANY OF GIRARD'S RIGHTS - MUCH AS IT WOULD LIKE TO DO FOR POLITICAL CONVENIENCE. FURTHERMORE JAPAN IS BEING ARBITRARY IN ASSERTING RIGHTS WHICH UNDER THE AGREEMENTS IT DID NOT HAVE AND THIS COURT IS NOT DUTY BOUND TO SURRENDER AS DID THE EXECUTIVE BRANCH OF OUR GOVERNMENT FOR POLITICAL CONSIDERATIONS.

IN HIS IMMORTAL FAREWELL ADDRESS, PRESIDENT WASHINGTON WITH SOUND JUDGMENT AND PROFOUND INSIGHT, DISCUSSED THE SEPARATION OF THE POWERS OF GOVERNMENT IN THE FOLLOWING STATEMENT:

> "IT IS IMPORTANT, LIKEWISE, THAT THE HABITS OF THINKING IN A FREE COUNTRY SHOULD INSPIRE CAUTION IN THOSE ENTRUSTED WITH ITS ADMINISTRATION, TO CONFINE THEMSELVES WITHIN THEIR RESPECTIVE CONSTITUTIONAL SPHERES; AVOIDING IN THE EXERCISE OF THE POWERS OF ONE DEPARTMENT TO ENCROACH UPON ANOTHER. THE SPIRIT OF ENCROACHMENT TENDS TO CONSOLIDATE THE POWERS OF ALL THE DEPARTMENTS IN ONE, AND THUS TO CREATE, WHATEVER THE FORM OF GOVERNMENT, A REAL DESPOTISM. . . . . BUT LET THERE BE NO CHANGE BY USURPATION; FOR THOUGH THIS, IN ONE INSTANCE MAY BE THE INSTRUMENT OF GOOD, IT IS THE CUSTOMARY WEAPON BY WHICH FREE GOVERNMENTS ARE DESTROYED. THE PRECEDENT MUST ALWAYS GREATLY OVERBALANCE IN PERMANENT EVIL ANY PARTIAL OR TRANSIENT BENEFIT WHICH THE USE CAN AT ANY TIME YIELD."

POINT I - THE ADMINISTRATIVE AGREEMENT AND SO-CALLED PROTOCOL IS UNCONSTITUTIONAL AND VOID AND ANY ACTION TAKEN BY THE EXECUTIVE BRANCH OF THE GOVERNMENT UNDER AUTHORITY OF SAID DOCUMENTS IS ILLEGAL.

This subject matter has been discussed generally hereinabove. The Constitution of the United States provides, among other things, that the power is in Congress "to make rules for the government and regulation of the land and Naval forces" that the power of the President is to execute the laws and "by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur"; that there must be equal protection of the laws and that all persons charged with an offense must be afforded due process (amendments 5, 6, and 14). It provides further that the judicial power of the United States, which includes the interpretation of treaties or executive agreements, is vested in the courts. No branch of the United States Government has the right to sacrafice a citizen for convenience or political motive and all branches may act only in their own defined sphere.

The Executive branch of the government was never vested with power to make or interpret Treaties or Executive Agreements, such as has been done in this case, nor does it have the power to supply meaning to contracts or Treaties. Leavenworth L. G.I. Co. v. U. S. 92 U. S. 733; 52 American Jurisprudence, p. 805. Treaties like any other contract or statute must be construed by the courts. It is the courts determination which is binding and any political decision as to or meaning or interpretation of a treaty or contract is null and void. Sullivan v. Kidd 255 U.S. 433; Valentine v. United States 299 U.S. 5;

An "Administrative Agreement" or a "Protocol", with or without "minutes" attached, or an expression of "Agreed Views" has no binding force particularly when it deprives a citizen of his constitutional rights. Cherokee Tobacco Case 11 Wall 616, 620; Geofroy v. Riggs 133 U.S. 258, 267.

The Administrative Agreement, Protocol, Minutes to Protocol, Agreed Views, and the other documents on which the respondents rely and which affect the lives and rights of a large segment of the American population, was not entered into in conformity with the provisions of the United States Constitution.

The making of the Agreements involved here is usurpation of power by the executive and is an invasion on the perogatives of the Congress and the Senate of the United States as outlined and defined by the Constitution. If permitted to go unchallenged, it will deny to the petitioner the equal protection of the laws and also deny him due process of law. It is obvious that many constitutional questions are here involved which may not be passed over lightly and which, on the other hand, cannot humanly be properly or adequately briefed in the time allotted to counsel. It may be well for the Government Attorney to pooh-pooh these problems and press for a hurried decision, but that would solve nothing. The two United States Senators who sat as a sub-committee of the Armed Services Committee of the United States Senate in the case of William S. Girard on June 5, 1957, (Senator Ervin and Senator Flanders) did not think that the subject was one that could be made light of. This court may take judicial notice of the report of that hearing. It is extracted in part in Exhibit I hereto attached. The questions involved in this case penetrate deeply into basic concepts of constitutional law and require careful consideration and study. Counsel can touch but briefly on the basic concepts because of the time limitation.

The Cozart case is referred to as a precedent. The Cozart case is not an adjudication as the Supreme Court of the United States has ruled. Furthermore, both that case and the Kay case involved off duty offenses and are in many other respects different from this one.

The Supreme Court of the United States in Cozart v. Wilson 77 S.Ct. Reports 126, after granting certiorari said: "Judgment of the Court of Appeals is vacated and the case is remanded to the District Court with directions to dismiss the petition for writ of Habeas Corpus on the ground that the case is moot" -- Citing United States v. Munsingwear 340 U.S. 36.

The Munsingwear case states: "that such procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented there through happenstance. When that procedure is followed; the rights of all the parties are preserved. No one is prejudiced by a decision which in the statutory scheme was only preliminary."

It is a reasonable inference to draw from the fact that certiorari was granted and the judgment of the Court of Appeals vacated, that the Supreme Court of the United States was not willing to let stand unchallenged

that which was enunciated as law in the courts below. There have been other cases which were mooted while on their way to our high court for determination. In many of them the Writ of Certiorari was denied because the question was moot. In any event, with the ruling of the Supreme Court as it now stands, the decision of the lower court cannot be regarded as stare-decisis. It should be noted further that the Court of Appeals in the Cozart case, based its opinion in part on Kinsella v. Kruger, which case was reversed by the Supreme Court of the United States on June 10, 1957. Reid v. Covert, Supra.

It is the contention of the petitioner that the constitutionality of the agreements which surrender jurisdiction to the Japanese government is very much in issue and that the application of those Agreements to this case is also an issue. These questions appear to have been determined adversely to the respondents in the Reid v. Covert case decided June 10, 1957. In that case an Administrative Agreement similar to the one in question was held un constitutional. The Reid case also overruled In Re. Ross 140 U.S. 453, on which the government placed reliance in the Cozart case.

The language of Mr. Justice Black is here particularly appropriate. He said, "...It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights - let alone alien to our entire constitutional history and tradition - to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.

There is nothing new or unique about what we say here. This Court has regularly and uniformly recognized the supremacy of the Constitution over a Treaty .....".

POINT II. AN ARMY IN THE TERRITORY OF A FOREIGN NATION IS NOT SUBJECT TO THE CRIMINAL LAWS OF THAT NATION WHETHER THEY ENTERED BY FORCE OR BY INVITATION.

Under international law, reaffirmed time and time again by the courts of the country, troops in a foreign territory are immune from the criminal jurisdiction of the territorial sovereign. Coleman v. Tennessee, 97 U.S. 509; Dow v. Johnson, 100 U.S. 158; Tucker v. Alexandroff, 183 U.S. 424; The Schooner Exchange, 7 Cranch 116; Hyde International Law as interpreted by U. S. Court, Vol. 1, Sec. 247; Archibald King, Jurisdiction Over Friendly Armed Forces 36 Amer. Journal of Int. Law 539.

In the Coleman case which has been cited with approval time and time again, at page 515, The Supreme Court of the United States said: "It is well settled that a foreign army permitted to march through a friendly country, or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place. The sovereign is understood, said this court in the celebrated case of The Exchange (7 Cranch 139), to cede a portion of his territorial jurisdiction when he allows the troops of a foreign prince to pass through his dominions: 'In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force..... Aside from this want of jurisdiction, there would be something incongruous and absurd in permitting an officer or soldier of an invading army to be tried by his enemy, whose country he had invaded."

A separate memorandum on the subject discussed under this Point and the several other Points of this brief is attached marked Exhibit III.

POINT III. ANY PERSON IN THE MILITARY SERVICE OF THE UNITED STATES IS NOT ACCOUNTABLE TO THE LAWS OF THE TERRITORY FOR AN ACT DONE IN THE COURSE OF HIS ASSIGNED DUTY AND IS ANSWERABLE ONLY IN THE COURTS OF THE UNITED STATES. THIS IS THE RULE EVEN THOUGH THERE MAY BE CONCURRENT JURISDICTION AND THE ACT COMPLAINED OF VIOLATED THE LAWS OF THE TERRITORY AS WELL AS THE MILITARY CODE.

The Executive branch of the government is unable, without express authority by law or treaty, to deliver a soldier or civilian to a foreign government for trial such as is sought to be done here and the Executive branch of the government has no inherent power to do so. Youngstown Sheet & Metal Co. v. Sawyer, 343 U.S. 579; Tucker v. Alexandroff, 183 U.S. 424; Geofroy v. Riggs, 133 U.S. 258; Whitney v. Robertson, 124 U.S. 190.

In Tucker v. Alexandroff supra, it was said: "In Moore on Extradition (Sec. 408), it is laid down as a general proposition that, in the absence of a treaty, the surrender of deserting seamen cannot be granted by the authorities of the United States; and an opinion of Attorney General Cushing (6 Op. 148), is cited upon that point. There is also another to the same effect (6 Op. 209). It is believed that in all the instances which arose between the United States and Great Britain prior to the treaty of 1892 for the reclamation of deserting seamen, both powers have taken the position that in the absence of a treaty there can be no reclamation. Several instances of this kind are cited by Mr. Moore in his treatise."

Power to make laws for the government of our armed forces is in Congress. Dyner v. Hoover, 20 How. 78. The President cannot, by order, directive or other arrangement change a law which Congress enacted for the trial of persons in the Armed Forces. Swain v. U.S., 28 Court of Claims 173, 165 U.S. 553; Talbott v. U.S., 215 Fed. 2nd 22, reversed on other grounds 350 U.S. 11. This rule necessarily precludes the President from taking any action with respect to with-

drawal or enlargement of Court-Martial Jurisdiction 6 Opinions Attorney General 11.

On May 5, 1940, the Congress of the United States, acting within its constitutional perogative, enacted the Uniform Code of Military Justice designed to govern the Armed Forces of the United States. It is specifically stated therein under Article V that the "code shall be applicable in all places" meaning all parts of the world and the Executive branch of the government is without power to vary the terms of that code by administrative agreements, protocol or in any other manner and the executive is without power to deliver up, for convenience or otherwise, any citizen of the United States to any foreign government for trial without the express mandate of the Congress. Valentine v. U. S., 299 U.S. 5; Artukovic v. Boyle, 107 Fed. Supp. 11; Schachtman v. Dulles, 222 Fed 2nd 938.

Any person acting in the course of duty as an agent of the United States is accountable only to United States Federal jurisdiction for any alleged unlawful act, civil or criminal. Cunningham Sheriff v. Neagle, 135 U.S. 1; 65 American Law Reports 733.

The same rule is applicable to persons in military service and it is not limited to domestic cases only. The rule is that any person in the military service of the United States is not accountable to the sovereign laws of any area for an act done in the course of his assigned duty and is answerable only in the courts of the United States. (A courts-martial is a court of the United States.) Other nations apply the same principle and it has recognition in international law. The rule is as above stated even though there may be concurrent jurisdiction and the act complained of violative of both the laws of the territory and the military code. Brown v. Cain, 56 Fed. Supp. 56; In Re Fair, 100 Fed. 149; U. S. Ex Rel Drury v. Lewis, 200 U.S. 1; United States v. Lipsett, 156 Fed. 65; In Re Wulzen, 235 Fed. 362; In Re Delgato, 57 Fed. Supp. 460; Colorado v. Maxwell, 125 Fed. Supp. 18; 135 A.L.R. 10; 153 A.L.R. 1342 and 151 A.L.R. 1463.

It was said in State v. Smith, (Oregon) 16 ALR 124 and in United States v. Daniels, 279 Fed. 844, that the military tribunals of the United States is a Federal tribunal and is given authority to determine any case over which it has jurisdiction. A Federal court, however, is duty bound on a petition for a Writ of Habeas Corpus to make the original determination as to whether or not the individual involved, military or civilian, was acting for and on behalf of the United States at the time of the occurrence of the offense charged. In this case it is so stipulated.

POINT IV. NO CITIZEN OF THE UNITED STATES MAY BE DELIVERED OR SURRENDERED BY THE AUTHORITY OF THE UNITED STATES TO ANY FOREIGN GOVERNMENT FOR TRIAL OF AN ALLEGED OFFENSE UNLESS A VALID TREATY OF EXTRADITION SO DIRECTS.

Extradition may be defined as the surrender by one nation or state to another of an individual accused of an offense within the territorial jurisdiction of the latter, which, being competent to try and punish demands the surrender. Terlinder v. Ames, 184 U.S. 270; Fitzpatrick v. Williams, (C.C.A. 5th) 46 F. 2d 40.

The right of one independent government to demand and receive from another the custody of an offender rests solely on the existence of treaty stipulations between them. U. S. v. Rauscher, 119 U.S. 407; Artukovic v. Boyle, 107 Fed. Supp. 11.

While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender an accused and it may be under a moral duty to do so, the legal right to demand him and the correlative duty to surrender him to the demanding country exists only when created by treaty. Valentine v. United States, 299 U.S. 5; Factor v. Laubenheimer, 290 U.S. 276; United States v. Rauscher, 119 U.S. 407.

In the absence of an extradition treaty, directing that a person be surrendered, the executive has no power to turn him over to a foreign government since no discretionary power exists. Valentine v. United States, 299 U.S. 5 (Opinion by Chief Justice Hughes).

Referring to the surrender power, the court, speaking through Chief Justice Teaney in the case of Holmes v. Jeneson, 14 Pet. 569, said, "In the United States, the general opinion has been, and practice has been in accordance with it, that in the absence of a conventional or legislative provision, there is no authority vested in any department of the government to seize a fugitive criminal and surrender him to a foreign power." Moore on Extradition, Vol. 1, Page 21; Vogt, Foreign Relations 1873 Pet 1, Page 81.

The construction of an extradition treaty is for the courts and they are not bound by the construction placed thereon by the executive or by the construction placed thereon by the foreign country with whom the treaty is made. Ex parte Charlton, 185 F. 880, affirmed Charlton v. Kelley, 229 U.S. 447. The same is true of the administrative agreement and protocol in this case. The Defense Department was without power to waive away any right which affected Girard because (1) there was no express authority to do so in the agreement, (2) no procedure was provided, or (3) to do so would be in contravention of the legal meaning of the words "line of duty" in the protocol, (4) political reasons or rules of expediency are not laws and (5) the persons acting on behalf of the Defense Department acted beyond the scope of their agency. See hearing before Senate sub-committee of Armed Forces Committee held on June 5, 1957 (Ex. 1).

A foreign government has no right to demand of the government of the United States a surrender of a citizen or subject of such foreign government, who has committed a crime in his own country and is afterward found within the limits of the United States. Such right has no existence without, and can only be secured by, a treaty stipulation. Ex Parte Dos Santos, Federal case 4,016, reported in 2 Brock. 493.

The United States Government has never acknowledged the right of foreign nations to demand the surrender of fugitives from justice, independent of Treaty stipulation. In re: Fitter, 1852, 23 N.J. Law 311, 57 Am. Dec. 382.

The President would not be justified in directing the surrender of a person in order that he may be brought to trial in the country where he is supposed to have committed an offense, when ther is no stipulation by Treaty between the two governments for the mutual delivery of fugitives. 1831, 2 Op. Atty. Gen. 452.

In re. Vogt, For. Rel. 1873, part 1, pg. 81 - the Acting Secretary of State, Mr. J. C. B. Davis, noted that

"The authority of the executive to abridge personal liberties within the jurisdiction of the United States, and to surrender a fugitive from justice in order that he may be taken away from their jurisdiction is derived from the Statutes of Congress, which confer that power only in cases where the United States are bound by Treaty to surrender such fugitive, and have a reciprocal right to claim similar surrender from another power." Re. Vogt, For. Rel. 1873 part 1, pg. 81.

It may be regarded as settled doctrine, that in the United States, the extradition of fugitives from the justice from foreign countries is a subject within the exclusive control of the National Government under its constitutional power of conducting foreign intercourse and making Treaties. Moore on Extradition, Vol. 1, pg. 53.

The steps which the Respondents contend vested power in them to deliver Girard to a foreign government, based on a purely political decision, are outlined and discussed in Exhibit V attached.

POINT V. WHETHER A CITIZEN OF THE UNITED STATES, CIVILIAN OR MILITARY MAY BE DELIVERED TO A FOREIGN GOVERNMENT FOR TRIAL UNDER PROVISIONS OF AN EXTRADITION TREATY OR AN EXECUTIVE AGREEMENT IS A MATTER FOR JUDICIAL DETERMINATION IN A FEDERAL COURT OF THE UNITED STATES.

The Act of Congress defining the procedure in extradition cases confers no power on the executive to surrender any person to a foreign government where no extradition treaty or convention provides for such surrender. Under extradition statutes and Treaties, the examining court must determine as to the commission of an offense and whether it comes within the treaty provision and thereafter the matter is certified to the Secretary of State for such action as the executive department may consider appropriate. In re Lucke 20 F. supp. 685; Artukovic v. Boyle, supra; Heely v. Hentel, 180 U.S. 109.

Jurisdiction of proceedings preliminary to final executive action to transfer an accused to a foreign country is vested by statute in and only in the Justices of the United States Courts, a Supreme Court Judge, (In re: Keene's Extradition, 6 F Supp. 308), a United States Circuit Judge, 18 U.S.C.A. Section 651, a United States District Judge, Bernstein vs Gross, (C. C.A. Tex.) 58 F. 2d 154, or a Commissioner expressly authorized to act by a court of the United States, 18 U.S.C.A. Section 3184. The employees of the State or Defense Departments are not vested with any authority by law nor are they so vested by the documents upon which reliance is placed in this case. See opinion of the Judge Advocate General (JAGA 1950/3124) attached as Exhibit IV wherein it was held that a U. S. soldier may not be returned by the Executive or the military to Panama for an offense allegedly committed there. (Ex. IV)

POINT VI. THE FACT THAT PETITIONER MAY OR MAY NOT RECEIVE A "FAIR TRIAL" BEFORE A JAPANESE COURT IS NOT MATERIAL TO ANY ISSUE IN THIS CASE.

The argument that Petitioner would receive a fair trial in a Japanese Court begs the issue and does not satisfy the requirements of due process. The bare assertion that such trial would be a fair one proves nothing. Admittedly, constitutional safeguards of substantive law, evidence and procedure would not be available to the Petitioner in a Japanese Court.

It is asserted by the respondents that a few rights have been agreed upon with the Japanese Government, but what happens if they are not followed? One of those rights involve the right of an accused to counsel of his own choice. In this very case, that right has been denied if reports appearing in the public press are correct. The Japanese attorney who the Petitioner does not want as his counsel, has stated publicly that Girard had no choice and that even if he were discharged, the Court would reappoint him. Does this constitute a right to have counsel of one's own choice?

The several basic rights to which respondents refer are empty and meaningless when detached from our whole body of law and procedure. What about the right to trial by jury or its constitutional equivalent - the right to trial by a body of non-legally trained military persons; or the right against double jeopardy; the right to remain silent without any adverse inference being drawn; to protection from cruel and unusual punishment; to apply for Presidential pardon; to the presumption of innocence; to no ex post facto laws; to no unreasonable search; to habeas corpus; to proof of guilt beyond a reasonable doubt; to preliminary showing of probable cause, and a host of others?

All the rhetoric and high sounding language cannot change the fact that a trial in a Japanese court is not the same as a trial in an American Tribunal, and our courts have so stated.

United States Supreme Court Justice Clark, in his opinion in the recent Reid case, said:

"It is clear that trial before an American court-martial in which the fundamentals of due process are observed is preferable to leaving American servicement and their dependents to the widely varying standards of justice in foreign courts throughout the world."

The Court of Military Appeals in U.S. v. Chas. F. Burney, No. 7750 decided March 30, 1956, at p. 38 said:

"It was the intent of founders of our Constitution to insure basic

guarantees of due process to each citizen. Treaties are the law of the land as well as statutes, and surely Congress and the Executive have not done anything inconsistent with that intent by providing trial by military tribunal for civilians overseas, for Constitutional safeguards are far more likely to be extended to United States citizens in a trial by court-martial than in a trial in a foreign court. The courts of foreign sovereigns, especially in civil law countries, are bound to follow traditions which are foreign to American standards of due process of law. Far better it is for an American accused to be tried by American court-martial, where he is entitled to representation, liberal rules of evidence, a presumption of innocence, and thorough review, than to be brought before a French, or Japanese, or German, or Moroccan, or even English civil court. In addition, because we are a nation of civilian soldiers, sailors, and airmen, many of the persons who now serve as court-martial members are the selfsame individuals who previously served on grand and petit juries, and their views of justice do not change with their garb.

"We think we may safely assert that American citizens would prefer trial by an American court-martial to a proceeding in a foreign tribunal if their wishes were to be given any consideration in the matter. Certainly that statement is true if any lesson can be drawn from the desires voiced by American servicement overseas.

In the Congressional Record, February 20, 1956, p. A1552, appears the following:

'Congressman Frank J. Becker, New York, visited American servicemen imprisoned in foreign jails. He concluded that the protection of the United States Constitution has been taken away from these citizens serving us overseas by the Status of Forces Treaty. These are the GI's who have been tried and convicted in foreign courts and are now serving sentences in foreign prisons.

'These imprisoned in France and England were visited. All the GI's in England said that they would have preferred to be tried by Army or Air Force court martial. They felt that they would have had a much fairer trial and would have preferred to have an American officer defend them, even if they would have received more severe penalties from United States authorities. This was the rule before the Status of Forces Treaty.

'In France, a man is guilty until proven innocent; under our Constitution, a man is presumed innocent and must be proven guilty. All but one GI

would have preferred the court martial to prosecution in the French courts. Their trials were conducted in French; in two cases the French lawyers could not speak English.'" (Underscoring supplied.)

See also concurring opinion of Chief Justice Quinn in the Burney case, where he said the following at page 41:

"At the outset, it is important to repeat what I said at the beginning of my dissenting opinion in United States v. Sutton, 3 USCMA 220, 228, 11 CMR 220: 'I have absolutely no doubt in my mind that accused persons in the military service of the Nation are entitled to the rights and privileges secured to all under the Constitution of the United States, unless excluded directly or by necessary implication, by the provisions of the Constitution itself.' Consequently, in my opinion, there is no merit to the argument that the Constitution has no application outside the continental limits of the United States. The cases cited in support of that argument deal with the general question of the territorial application of the Constitution. Hawaii v. Mankichi, 190 U.S. 197, 23 S. Ct. 787, 47 L. ed. 1016; Downes v. Bidwell, 182 U.S. 244, 21 S. Ct. 770, 45 L. ed. 1088; or with the practical inapplicability of specific provisions of the Constitution to 'residents or temporary sojourners abroad.' Ross v. McIntyre, 140 U.S. 453, 464, 11 S. Ct. 897, 35 L. ed. 581. Our armed forces are now stationed in 63 foreign countries, as part of our program of national defense and our effort to preserve the peace of the world. They are not thereby deprived of their Constitutional rights and privileges. On the contrary, those Constitutional rights and privileges are a fundamental part of the military law. And the military law governs our armed forces whether they are within or without the continental limits of the United States." (Underscoring supplied.)

C O N C L U S I O N

Predicating authority on vague and nebulous powers allegedly vested in them, the military is attempting to deliver Girard to the Japanese government for trial. They assert that no extradition is necessary and that no judicial hearing may be afforded Girard to determine the propriety of their conduct; that they have the exclusive right to make such political decisions (Par. 7, Respondent's Return); that jurisdiction is a political question under their self-executed agreements and that there must be no breach of the agreement they reached with Japan. Japan, on the other hand, must know that no Agreement or Treaty with the United States is valid without ratification, In Re. Sutherland 53 Fed. 551, and that our law does not permit ratification by implication. The consent of the Senate must be expressed. Taylor, Int. Public Law, Sec. 364.

Power to act is one thing, and the propriety of the exercise of that power is another. Certainly, the military has it within its power to act, regardless of the illegality of its action, but if the so-called administrative Agreement is valid, what would happen in the event Girard was either outside of military power or had returned to the United States? If, as Respondents contend, the Agreement is valid and we must honor it by delivering Girard to the Japanese authorities for trial, they must also argue that they may enter Girard's home in Illinois and remove him therefrom for the delivery of the Japanese authorities. There is nothing in any of the documents which counsel have read making the place of seizure a determining factor in so far as obligation to return him is concerned.

If he is not entitled to a judicial hearing while in Japan, he is not entitled to a judicial hearing while he is in the United States. That being so, he could be turned over to a foreign government merely on a political decision of the Executive Department. That is the contention of the Respondents in this case and if there is any merit to it, the Soviet Gestapo system begins to loom mild by comparison.

It is incredible to counsel that any officer of the United States would assert before a court of the United States that a man's rights may be determined by a political decision of the Executive Branch of this government. But they do not stop there. They say that that political decision is not subject to a judicial review. (Respondent's Answer, Par. 7).

The asserted power under which the Executive may sacrifice the person of

Girard to satisfy Japanese public opinion, must also extend to them the right to whisk Girard out of his native state and country without a judicial hearing to carry out such political decision. If it is contended that we are overstating the Respondent's position, then we would ask at what point, territorily, does the power derived from a political decision cease? When Girard is one mile off the coast of Japan? When he is midway over the Pacific Ocean? Or when he touches American soil? To pose these questions points up how utterly untenable the Respondent's contentions are.

In argument, counsel for Petitioner used by way of example the case of the Japanese government making demand for a newspaper man who was accompanying our Armed Forces on the mainland of Japan, and who had written a critical article which the Japanese deemed a violation of their laws of criminal libel. May such a man be delivered to the Japanese authorities upon request? Under the "Protocol" and under the Uniform Code of Military Justice, he is in the same category as Girard. May the long arm of the Army remove him from his home in the United States, in the event the so-called discretionary political decision was made by the military authorities to turn him over to the Japanese government? Under the terms of the documents upon which the government relies, if they are valid, we would have to deliver this newspaper correspondent upon request. All these, and many others are problems which would arise because, as is contended by the Petitioner, certain officials in our government saw fit to overstep the powers allocated under our Constitutional system. Their original Administrative Agreement was unconstitutional and illegal. The subsequent Protocol and additional documents fall in the same category, and the attempt to enforce it in this case is likewise illegal.

As set forth herein and as particularized in the supplemental Memoranda attached hereto as Exhibit III, the Petitioner is accused of an offense defined by an "Agreed View" of a Subcommittee composed of civilian employees of the governments of Japan and the United States of America.

The authorities under which they claim the power to define the offense is derived from the "Agreed Minutes" of a purported "Protocol", or preliminary Agreement reached with an Ambassador of the United States.

This "Protocol", in turn, is now claimed to effect an amendment to an "Administrative Agreement" approved solely by the President on behalf of the United States.

The "Administrative Agreement", in turn, is claimed to have effected an amendment of the "Security Treaty" entered into between Japan and the United

States with the concurrence of the required two-thirds of the Senate of the United States.

This successive claim of self-investiture of authority for promulgating "Treaty law" under which citizens of the United States may be forcibly removed to foreign courts for trial in violation of their most fundamental constitutional rights, and denied access to their own courts on the ground of unlimited and uncontrolled "political" power, is a replication of the "Fuhrer Princip" of the Nazi Regime. It differs from Hitler's assumption of absolute political power in only one respect. Whereas he grabbed unlimited power under the single "Enabling Statute" of 1933, the power here grabbed is by the more subtle Soviet technique of "little by little". The end result is the same -- absolute dictatorship unless the judicial power intervenes now before it is too late.

"Power corrupts - Absolute power corrupts absolutely."

The guilt or innocence of Girard is not an issue in the present proceedings, just as the question of the fairness of a trial before the Japanese court is not an issue. Certainly our own courts are fully competent to dispense justice under our system of law and in the event of guilt mete appropriate punishment. The issue is squarely whether the political decision made in this case is right or wrong under law and the rule of law.

It is accordingly respectfully requested that the application herein be granted.

In the event the Court determines adversely to the Petitioner, it is respectfully requested that the Stay contained in the Order to Show Cause be continued, so as to give the Petitioner an opportunity for review in the higher Court. The request is made because it is feared that there will be immediate delivery of the person of Girard to the Japanese authorities which may result in making this litigation moot and make it impossible to appeal to our higher courts for decision on these important legal questions. It is obvious that a return of Petitioner from the Japanese authorities could not be obtained short of war, in the event they refused to release him and continued adament in their demands on his person.

Respectfully submitted,

Joseph S. Robinson
Earl J. Carroll
Dayton M. Harrington
Arthur Friedman
Neal J. Dunn

Attorneys for Petitioner

In the hearing before the sub-committee of the committee on Armed Services, United States Senate, reference the William S Girard case held on June 5, 1957, the following appears: "Senator Ervin - Under the Japanese interpretation, it would seem to me, it is a rather strict interpretation. In other words, the question of whether an offense arose out of any act or omission performed in the performance of official duty if the Japanese position is correct on that, it would seem to me it would be virtually impossible for the United States to have primary jurisdiction under this second category of concurrent jurisdiction because the offense would have to be authorized, and it is extremely unlikely that a superior officer of an American serviceman would specifically either expressly or impliedly authorize him to commit a crime.

Mr. Dechert - I think that is not necessarily so, sir. Suppose this woman had come rushing up at the machine gun. He wasn't specifically authorized to shoot her (having no ball ammunition), but he was directed to protect the machine gun. Though under such presumed facts he might have been using more force than was appropriate under the circumstances, I think he would still clearly be in the performance of his duty in that hypothetical case.....

After our people had continued for 5 weeks to press the view that in this case he was in the performance of duty, the request for instructions came back. The instructions were given that they should continue to press for the performance of duty concept and for our primary jurisdiction, but since this matter must be resolved and since the trial had already been long delayed, they were instructed that if further efforts resulted only in a deadlock, they were authorized to file the kind of waiver which the Japanese had filed in these 97 1/2 percent of the cases in which they had admitted primary negotiations. They continued to negotiate in this Joint Committee - the representatives of the Far East Command

EXHIBIT I

as our American representative, and the State Department through the Embassy in Tokyo had someone there as an observer. This was carried on in negotiations for another 3 weeks, but it finally became impossible to resolve the matter, and in the meantime the furor in the Japanese papers was still continuing and the man was untried. The issue then arose as to what should be done.

It was therefore decided that without withdrawing our certificate a waiver would be made in favor of trial by the Japanese, it having been already stated that Japan would indict him for the least possible offense, which is "death as a result of wounding," as stated in the official statement.

.....

Senator Ervin. - How old was Girard?

Mr. Dechert - Girard is about 21.

Senator Ervin - Well, now the Commanding Officer came to the conclusion that this offense or alleged offense arose out of an act or omission done by him in the performance of his official duty.

Mr. Dechert - The Commanding Officer's certificate has never been withdrawn.

Senator Ervin - And his representative on the Joint Committee took the same view.

Mr. Dechert - And that has never been withdrawn.

Senator Ervin. - And that was referred to the Defense Department.

Mr. Dechert - And the final decision to allow Japan to try really relates back to the Defense Department.

Senator Ervin - The Defense Department came to the same conclusion, however, didn't it, as the Commanding Officer and the American representative on the Joint Committee?

Mr. Dechert - They were acting, I think, on instructions from the Defense Department, so it could not be said that they would independently have taken this action. They were continuing to press

for the position that he was in performance of his duty and that we should conduct the trial, but there had been a deadlock which continued from the 12th of March until about the 12th of May, 2 whole months and in the meantime Girard was in restraint and the Japanese situation was becoming more and more inflamed, and, as I said, the Japanese had indicated that they would try him for the least possible offense.

.....

Senator Ervin - To put this question perhaps another way. I notice in the press release that was issued jointly by the Department of Defense and the Department of State, so this decision reached was a joint decision of the State Department.

Mr. Dechert - The initial decision I have indicated was not a joint decision, it was a decision of the Defense Department. However, as indicated, the State Department was fully informed from the beginning as to what was going on and they had official representatives of the American Embassy attending all those Joint Committee deadlocked meetings as an observer.

Senator Ervin - I was rather astounded by the statement in the joint statement which follows.

Mr. Dechert - The fact that it was a joint statement, you mean?

Senator Ervin - No, I am not astounded by that. It is this statement in one of these statements on page 3:

> Department of Defense instructions were accordingly issued through the Department of the Army to the Far East Command to the effect that the United States representative on the Joint Committee should continue to press the claim for jurisdiction but that in case of continued deadlock he was authorized to waive jurisdiction to Japan.

In other words, that means to me, you insist on maintaining our position unless the other side refuses to accede to it, then agree to their position.

Mr. Dechert - In effect what happened was this: They had had a deadlock for a month and they asked what they should do

thereafter. They were told to keep on trying, because we would like to have this established if we can, but if this is going to result in an overlong delay, with Girard still untried and this matter still inflaming the public, then we authorize you to do this.

(Discussion off the record.)

Senator Flanders - There was an alternative to the action taken and that was to refer the matter to the two Governments.

Mr. Dechert - That's right. Under the provision of the treaty it could have been referred to the two governments. That was not done--and the reasoning behind its not being done was that in effect it was the two Governments that had been negotiating during this long period, and such a reference would result in a still further postponement of the trial and still further inflammation of the situation in Japan.

Senator Flanders - That would seem to have been a decision within the jurisdiction of the State Department rather than within the jurisdiction of the Army.

Mr. Dechert - The jurisdiction of the Defense Department.

Senator Flanders - Of the Defense Department?

.....

Senator Ervin - I would seriously question that article III, the article of the Security Treaty which merely provides this substance that there should be the disposition of the forces, American forces in and about Japan should be determined by an Administrative Agreement.

I seriously question whether that authorized these gentlemen's agreements about jurisdiction over crimes, because that would refer to the placing of where soldiers would be stationed.

.....

Senator Ervin - Are you able to shed any light on the role of the State Department in the matter of reaching this decision?

Mr. Dechert - Mr. Raymond of the State Department is here, but I think I have fairly stated the fact that they had no part in the decision itself as to what to instruct the Far East Command, but on the other hand they were thoroughly informed about all the circumstances from the beginning.

.....

Senator Ervin - I seriously question the validity of the Administrative Agreement, the validity of the Protocol, the validity of the agreed official minutes and the validity of the agreed views on the grounds that I do not think that article III--I wouldn't go so strong as to say I do not think--but I seriously doubt the sufficiency of article III of the treaty to authorize the making of these subsequent agreement . . . . . .

.....

Senator Ervin - I can appreciate the difficulty and the delicacy of the situation but I don't believe the fact that it may be a worldwide pattern--I seriously question whether that would justify our position because we are operating under a written Constitution that says treaties must be ratified by the Senate and I have a conviction that agreements which foreign countries of any substantial nature ought to be under the Constitution--ought to be embodied in the Treaty or at least expressly authorized by the Treaty.

I want to thank you for appearing before the committee and the very complete and very frank exposition of the situation you have given us.

.....

THE ARMED FORCES OF THE UNITED STATES, PASSING THROUGH OR STATIONED IN ANOTHER NATION WITH THAT NATION'S CONSENT, ARE EXEMPT FROM THE CRIMINAL JURISDICTION OF THAT NATION'S COURTS, AND THE UNITED STATES HAS EXCLUSIVE JURISDICTION OVER THE CRIMINAL OFFENSES COMMITTED IN THAT NATION BY MEMBERS OF ITS ARMED FORCES UNDER THE GENERAL RULES OF INTERNATIONAL LAW.

SOVEREIGNTY IS STILL ONE OF THE BASIC TENETS OF INTERNATIONAL LAW AND SIMPLY STATED MEANS THAT EACH INDEPENDENT NATION IS SUPREME WITHIN ITS OWN TERRITORY. (1 HACKWORTH 47, 1 HYDE 340, 1 OPPENHEIM 135). ONE OF THE MOST IMPORTANT ATTRIBUTES OF SOVEREIGNTY IS JURISDICTION OVER ALL PERSONS AND THINGS WITHIN SUCH TERRITORY. (1 HACKWORTH 51, 1 HYDE 319-20, 1 OPPENHEIM 280). RESTRICTIONS UPON THIS JURISDICTION MAY BE IMPOSED BY THE NATION ITSELF, OR MAY BE YIELDED BY THE COMMON CONSENT OF ALL NATIONS. BECAUSE ONE SOVEREIGN NATION CANNOT EXERCISE JURISDICTION OVER ANOTHER SOVEREIGN NATION WITHOUT SUBJECTING SUCH OTHER NATION TO ITS DOMINATION, SEVERAL RESTRICTIONS ON JURISDICTION HAVE BEEN YIELDED BY THE COMMON CONSENT OF ALL NATIONS AND HAVE COME TO BE REGARDED AS RULES OF INTERNATIONAL LAW.

IN DISCUSSING THE PRINCIPLE OF EXTRTERRITORIALITY, ALL WRITERS AGREE WITH HACKWORTH THAT "FOREIGN FRIENDLY SOVEREIGNS, THEIR ACCREDITED DIPLOMATIC REPRESENTATIVES, THEIR ORGANIZED ARMED FORCES WHEN ENTERING OR CROSSING TERRITORY OF THE STATE WITH THE CONSENT OF THE TERRITORIAL SOVEREIGN, AND THEIR PUBLIC VESSELS AND PUBLIC PROPERTY IN THE POSSESSION OF AND DEVOTED TO THE SERVICE OF THE STATE, ARE EXEMPT FROM THE LOCAL JURISDICTION. (2 HACKWORTH 393).

VATTEL, THE FRENCH TEXTWRITER WHO PROBABLY HAD A GREATER INFLUENCE ON THE DEVELOPMENT OF UNITED STATES CONCEPTS OF INTERNATIONAL LAW THAN ANY OTHER PERSON, WROTE IN 1758 THAT:

"THE GRANT OF A RIGHT OF PASSAGE INCLUDES THE GRANT OF WHATEVER IS NATURALLY CONNECTED WITH THE PASSAGE OF TROOPS, AND THOSE THINGS WITHOUT WHICH IT COULD NOT TAKE PLACE, THIS INCLUDES THE RIGHT OF THE BELLIGERANT TO TAKE WITH HIM WHATEVER IS NEEDED BY AN ARMY, THE RIGHT TO EXERCISE MILITARY DISCIPLINE OVER THE SOLDIERS AND OFFICERS, THE PERMISSION TO BUY AT A FAIR

PRICE SUCH THINGS AS THE ARMY MAY REQUIRE, UNLESS *** IT HAS BEEN STIPULATED THAT THE BELLIGERANT IS TO CARRY HIS PROVISIONS WITH HIM ..

(E. DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW (TRANSLATION OF EDITION OF 1758 BY CHARLES G. FENWICK)) WASHINGTON .. 1916, P. 274, 276, SEE ALSO IDEM., PHILADELPHIA, 1817, P. 340-1, 344.)

THIS PRINCIPLE OF INTERNATIONAL LAW WAS ADOPTED BY THE SUPREME COURT OF THE UNITED STATES IN 1812 IN THE SCHOONER EXCHANGE V. MCFADDON ET AL (7 CRANCH 116), AND IT HAS EVER SINCE REMAINED THE BASIC PRINCIPAL OF INTERNATIONAL LAW FOR THE UNITED STATES.. IN THAT CASE, CHIEF JUSTICE MARSHALL, IN DELIVERING THE OPINION OF THE COURT, SAID:

"ONE SOVEREIGN BEING IN NO RESPECT AMENABLE TO ANOTHER AND BEING BOUND BY OBLIGATIONS OF THE HIGHEST CHARACTER NOT TO DEGRADE THE DIGNITY OF HIS NATION, BY PLACING HIMSELF OR ITS SOVEREIGN RIGHTS WITHIN THE JURISDICTION OF ANOTHER, CAN BE SUPPOSED TO ENTER A FOREIGN TERRITORY ONLY UNDER AN EXPRESS LICENSE, OR IN THE CONFIDENCE THAT THE IMMUNITIES BELONGING TO HIS INDEPENDENT SOVEREIGN STATION, THOUGH NOT EXPRESSLY STIPULATED, ARE RESERVED BY IMPLICATION, AND WILL BE EXTENDED TO HIM.

"THIS PERFECT EQUALITY AND ABSOLUTE INDEPENDENCE OF SOVEREIGNS, AND THIS COMMON INTEREST IMPELLING THEM TO MUTUAL INTERCOURSE, AND AN INTERCHANGE OF GOOD OFFICES WITH EACH OTHER, HAVE GIVEN RISE TO A CLASS OF CASES IN WHICH EVERY SOVEREIGN IS UNDERSTOOD TO WAIVE THE EXERCISE OF A PART OF THAT COMPLETE EXCLUSIVE TERRITORIAL JURISDICTION, WHICH HAS BEEN STATED TO BE THE ATTRIBUTE OF EVERY NATION.

WHEATON, WHO WAS THE FIRST AMERICAN TEXTWRITER AND WHO WAS INFLUENCED BY VATTEL, HAS STATED HIS OPINION THAT:

"THE MUNICIPAL INSTITUTIONS OF A STATE MAY ALSO OPERATE BEYOND THE LIMITS OF ITS TERRITORIAL JURISDICTION, IN THE FOLLOWING CASES:

***

3. A FOREIGN ARMY OR FLEET, MARCHING THROUGH, SAILING OVER, OR STATIONED IN THE TERRITORY OF ANOTHER STATE, WITH WHOM THE FOREIGN SOVEREIGN TO WHOM THEY BELONG IS IN AMITY, ARE ALSO, IN LIKE MANNER, EXEMPT FROM CIVIL AND CRIMINAL JURISDICTION OF THE PLACE." (H. WHEATON ELEMENTS OF INTER. LAW ((THE LITERAL REPRODUCTION OF ED. 1866 BY DANA EDITED WITH NOTES BY GEORGE G. WILSON)) LONDON, 1936, P. 128).

SIR ROBERT PHILLIMORE, AN INTERNATIONALLY KNOWN BRITISH WRITER, WHOSE WORKS ARE STILL CONSULTED AND WHO SERVED AS A MEMBER OF QUEEN VICTORIA'S PRIVY COUNCIL AND AS JUDGE OF THE HIGH COURT OF ADMIRALTY, IN HIS COMMENTARIES, STATES:

"IF A FOREIGN ARMY BE PERMITTED TO PASS THROUGH OR BE STATIONED IN, THE TERRITORIES OF ANOTHER STATE, THE PERSONS COMPOSING THAT ARMY, OR BEING WITHIN ITS LINES, ARE ENTITLED TO EXTRATERRITORIAL PRIVILEGES." (SIR ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW ((3RD ED.)), LONDON, 1879, P. 474).

TO THE SAME EFFECT, SEE LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW, VOL. I, PP. 752-760 (CLUNET, "LA PRESENCE DES ALLIES EN FRANCE AT L'EXTERRITORALITE", 514-516, ALINE CHALUFOUR, LE STATUT JURIDIQUE DES TROUPS ALLIES PENDANT LA GUERRE, 1914-1918, P. 15. L. VAN PRAAG, JURISDICTION ET DROIT INTERNATIONAL PUBLIC, SEC. 246. GEORG JUNDERLICH, "DIE GERICHSBARKEIT DER HURESGRUPPE YILDIRIM," MITTEILUNGEN DER DEUTSCHEN GESELLSCHAFT FUR VOLKERRECHT, VOL II, 1932, P. 79 87-89.)

AMONG LATIN AMERICAN NATIONS THE BUSTAMENTE CODE STATES THE LAW CURRENTLY IN FORCE AS FOLLOWS:

ART. 200. NOR ARE THE PENAL LAWS OF THE STATE APPLICABLE TO OFFENSES COMMITTED WITHIN THE FIELD OF MILITARY OPERATIONS WHEN IT AUTHORIZES THE PASSAGE OF AN ARMY OF ANOTHER CONTRACTING STATE THROUGH ITS TERRITORY, EXCEPT OFFENSES NOT LEGALLY CONNECTED WITH SAID ARMY. (FINAL ACT OF THE SIXTH INTERNATIONAL CONFERENCE OF AMERICAN STATES, P. 16.)

THE SAME PRINCIPLE HAS BEEN STATED BY AUTHORITATIVE MODERN AMERICAN WRITERS. BIRKHIMER, WRITING ON MILITARY GOVERNMENT AND MARTIAL LAW, STATES:

IT IS WELL SETTLED THAT A FOREIGN ARMY PERMITTED TO MARCH THROUGH A FRIENDLY COUNTRY, OR TO BE STATIONED IN IT, BY PERMISSION OF ITS GOVERNMENT OR SOVEREIGN, IS EXEMPT FROM THE CIVIL AND CRIMINAL JURISDICTION OF THE PLACE. ***. (BIRKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW, SECTION 114.)

CHARLES CHENEY HYDE, THE GREATEST LIVING AMERICAN WRITER ON INTERNATIONAL LAW SAYS:

STRONG GROUNDS OF CONVENIENCE AND NECESSITY PREVENT THE EXERCISE OF JURISDICTION OVER A FOREIGN ORGANIZED MILITARY FORCE WHICH, WITH THE CONSENT OF THE TERRITORIAL SOVEREIGN, ENTERS ITS DOMAIN. MEMBERS OF THE FORCE

WHO THERE COMMIT OFFENSES ARE DEALT WITH BY THE MILITARY OR OTHER AUTHORITIES OF THE STATE TO WHOSE SERVICE THEY BELONG, UNLESS THE OFFENDERS ARE VOLUNTARILY GIVEN UP. ***." (CHARLES CHENEY HYDE, INTERNATIONAL LAW, ETC., VOL. 1, P. 619, 2D REV. ED.)

ANOTHER LEARNED BRITISH AUTHOR, OPPENHEIM, FORMERLY WHEWELL PROFESSOR OF INTERNATIONAL LAW AT THE UNIVERSITY OF CAMBRIDGE, SAYS (INTERNATIONAL LAW, 4TH ED. VOL. 1, SEC. 445):

> "WHENEVER ARMED FORCES ARE ON A FOREIGN TERRITORY IN THE SERVICE OF THEIR HOME STATE, THEY ARE CONSIDERED EXTRA-TERRITORIAL AND REMAIN, THEREFORE, UNDER ITS JURISDICTION. A CRIME COMMITTED ON FOREIGN TERRITORY BY A MEMBER OF THESE FORCES CANNOT BE PUNISHED BY THE LOCAL CIVIL OR MILITARY AUTHORITIES, BUT ONLY BY THE COMMANDING OFFICER OF THE FORCES OR BY OTHER AUTHORITIES OF THEIR HOME STATE. THIS RULE, HOWEVER, APPLIES ONLY IN CASE THE CRIME IS COMMITTED, EITHER WITHIN THE PLACE WHERE THE FORCE IS STATIONED, OR IN SOME PLACE WHERE THE CRIMINAL WAS ON DUTY; IT DOES NOT APPLY, IF, FOR EXAMPLE, SOLDIERS BELONGING TO A FOREIGN GARRISON OF A FORTRESS LEAVE THE RAYON OF THE FORTRESS, NOT ON DUTY BUT FOR RECREATION AND PLEASURE, AND THEN AND THERE COMMIT A CRIME. THE LOCAL AUTHORITIES ARE IN THAT CASE COMPETENT TO PUNISH THEM."

SO DISTINGUISHED AN ENGLISH LAWYER AS SIR ARNOLD MCNAIR HAS SAID (LEGAL EFFECTS OF WAR, CAMBRIDGE, ENGLAND, 1944, PG 357)

> "UNLESS THE LAWS OF THE ALLIED COUNTRY LIMIT THE VALIDITY OF GOVERNMENTAL ACTS TO THOSE DONE UPON THE TERRITORY OF THAT COUNTRY OR A PARTICULAR PORTION OF IT, IT IS SUBMITTED THAT IT IS IMMATERIAL IN AN ENGLISH COURT WHERE THE OFFICIAL ACT IS DONE - BE IT IN THE HOME TERRITORY OR BE IT ON BRITISH TERRITORY WHEREON HIS MAJESTY HAS CONSENTED TO THE ESTABLISHMENT OF THE ALLIED GOVERNMENT AND THE EXERCISE OF ITS GOVERNMENTAL FUNCTION." (UNDERSCORING SUPPLIED)

AMERICAN AUTHORITIES. THE SAME PRINCIPLE HAS BEEN STATED BY AUTHORITATIVE AMERICAN WRITERS. IN BIRKHIMER ON MILITARY GOVERNMENT AND MARTIAL LAW, SECTION 114, THE LEARNED AUTHOR SAYS: ****

> "IT IS WELL SETTLED THAT A FOREIGN ARMY PERMITTED TO MARCH THROUGH A FRIENDLY COUNTRY, OR TO BE STATIONED IN IT, BY PERMISSION OF ITS GOVERNMENT OR SOVEREIGN, IS EXEMPT FROM THE CIVIL AND CRIMINAL JURISDICTION OF THE PLACE.***

IN AN EXHAUSTIVE ARTICLE ON THE SUBJECT BY COLONEL ARCHIBALD KING (JURISDICTION OVER FRIENDLY FOREIGN ARMED FORCES, 36 AMERICAN JOURNAL OF INTERNATIONAL LAW, 547), IT IS CONCLUDED THAT IN INTERNATIONAL LAW, "PERMISSION BY ONE NATION FOR THE TROOPS OF ANOTHER TO ENTER OR REMAIN IN THE FORMER'S TERRITORY CARRIES WITH IT EXTRATERRITORIALITY, AN EXEMPTION OF THE TROOPS IN QUESTION FROM THE COURTS OF THE COUNTRY AND A PERMISSION FOR THE OPERATION OF THE COURTS MARTIAL OF THE VISITING ARMY." ANOTHER AUTHORITY, THE RENOWNED PROFESSOR JOHN H. WIGMORE, TAKES THE SAME POSITION

IN HIS ARTICLE "THE EXTRATERRITORIALITY OF THE UNITED STATES ARMED FORCES ABROAD." (29 AMERICAN BAR ASSOCIATION JOURNAL, 121).

IN A MORE RECENT CASE, HEWITT V. SPEYE, (250 FED 367, 371) THE DOCTRINE WAS THUS FORCIBLY STATED -

> WE TAKE THE PRINCIPLE TO BE INCONTROVERTIBLE ***, THAT OUR COURTS, NOT ONLY WILL NOT ADJUDICATE UPON THE VALIDITY OF THE ACTS OF A FOREIGN NATION PERFORMED IN ITS SOVEREIGN CAPACITY, BUT ALSO THAT PERSONS INVOLVED IN THE PERFORMANCE OF SUCH ACTS CAN NOT BE SUBJECTED TO A CIVIL LIABILITY THEREFOR.

FROM THE FOREGOING IT IS APPARENT THAT THERE IS SUFFICIENT AUTHORITY OF BOTH AMERICAN AND BRITISH COURT DECISIONS TO ESTABLISH AS SETTLED LAW THE PRINCIPLE THAT AN OFFICER OR EMPLOYEE OF ANY GOVERNMENT PERFORMING OFFICIAL DUTIES ON THE SOIL OF ANOTHER COUNTRY WITH ITS CONSENT OR AID IS NOT BE LIABLE TO SUIT IN THE COURTS OF THE LATTER COUNTRY ON ACCOUNT OF THE PERFORMANCE OF OFFICIAL ACTS.

JAGA 1950/3124 2 May 1950

MEMORANDUM FOR JAGO FILES

SUBJECT: Extradition of American Soldiers to Panama

1. Reference is made to the informal request of Lieutenant General M. B. Ridgeway, Deputy Chief of Staff for Administration, for answer to the following question:

Is the United States, pursuant to any treaty with Panama or otherwise, obligated to turn over to Panamanian authorities a United States' soldier who has committed armed robbery in the Republic of Panama and for whose return the Republic of Panama has asked?

2. It would appear from the facts presented that two American soldiers stationed in the Canal Zone committed armed robbery in the Republic of Panama. Each was tried by general court-martial in the Canal Zone and sentenced to ten years imprisonment ordered to be served in the United States. The Panamanian Government has requested their return to that country.

3. Articles 1, 2, and 5 of the Treaty between the United States and Panama for the mutual extradition of criminals signed 25 May 1904 (Treaty Series 445) provide:

"Article I.

The Government of the United States and the Government of the Republic of Panama mutually agree to deliver up persons who, having been charged with or convicted of any of the crimes and offenses specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territories of the other: Provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial if the crime or offense had been there committed.

"Article II.

Extraction shall be granted for the following crimes and offenses:-

* * *

3. Robbery, defined to be the act of feloniously and forcibly taking from the person or another money, goods, documents or other property by violence or putting him in fear; Burgulary.

"* * *

"Article V.

Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this Treaty."

Title 18, U.S.C., section 3184, sets out the procedure to be followed in implementation of an extradition treaty, in the following language:

"Whenever there is a treaty or convention for extradition between the United States and any Foreign government, any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes

provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

The act of 24 August 1912 (37 Stat. 569, 48 U.S.C. 1330) provides in pertinent part:

"All laws and treaties relating to the extradition of persons accused of crime in force in the United States, to the extent that they may not be in conflict with or superseded by any special treaty entered into between the United States and the Republic of Panama with respect to the Canal Zone, and all laws relating to the rendition of fugitives from justice as between the several States and Territories of the United States, shall extend to and be considered in force in the Canal Zone, and for such purposes and such purposes only the Canal Zone shall be considered and treated as an organized Territory of the United States."

The act of 5 July 1932 (47 Stat. 574; 48 U.S.C. 1330a, b) is related to the question presented. It provides for the extradition of United States' citizens from the Canal Zone to the Republic of Panama in part as follows:

"Sec. 1. That all persons who have been condemned, prosecuted or accused before the courts of the Republic of Panama as authors or accomplices of crimes, transgressions, or offenses against the laws of said Republic, who seek refuge in the Canal Zone, shall be, upon apprehension, taken into custody by the authorities of the Canal Zone and delivered to the authorities of the Republic of Panama, upon the demand of the Government of that Republic and compliance with the procedure herein prescribed.

"Sec. 2. The government of the Canal Zone is at liberty to decline compliance with a demand of the Government of the Republic of Panama for the arrest and delivery to the authorities of said Republic of a fugitive from the justice of the Republic of Panama when said fugitive is a citizen of the United States. The discretion reserved shall be exercised by the Governor of the Panama Canal.

"* * *"

That act is not for application under the submitted facts.

4. Extradition is the delivery of an individual to the state on whose territory he is alleged to have committed, or to have been convicted of, a crime by the state on whose territory the alleged criminal is found (1 Oppenheim, International Law, 7th Ed., 635; 2 Hyde, International Law 1012). The object of extradition can be any individual, whether he is a citizen of the prosecuting state, of the state which is requested to extradite him, or of a third state (Oppenheim, op. cit., 638).

In 1936 the United States Supreme Court in the case of Valentine v. United States ex rel. Neidecker (299 U.S. 5) considered a case involving the extradition to France of two native-born citizens of the United States who were charged with the commission of crimes in France which were among the extraditable offenses specified in the extradition treaty with France. They fled to the United States and were arrested in New York City on the request of the French authorities under a warrant issued by the United States Commissioner. They were held for extradition but by writs of habeas corpus they challenged the jurisdiction of the commissioner on the ground that because they were citizens of the United States, the President had no constitutional authority to surrender them to the French Republic. Article V of the extradition Treaty with France upon which they relied was similar in language to Article V of the extradition treaty with Panama, supra. In arriving at a decision in this case the Supreme Court stated that the President had no power to extradite fugitive criminals except where such power is conferred by treaty or by act of Congress. The court expressed the view that the Act of 6 June 1900 (31 Stat. 656; formerly 18 U.S.C. 651; now reenacted as 18 U.S.C. 3184, supra) defining the procedure to be followed in extradition cases confers no power upon the President to surrender any person to a foreign government where no extradition convention or treaty provides for such surrender. The court stated that Article V of the treaty with France was "explicit in the denial of any obligation to surrender citizens of the asylum state --". "Neither of the contracting Parties shall be bound to deliver up its own citizens." The court held that as Article V provides that there shall be no obligation on the part of either party to deliver up its own citizens, the latter are necessarily excepted from the agreement in Article I and from the class of "person" therein described. The effect is precisely the same as though Article I had read that the two governments "mutually agree to deliver up persons except its own citizens or subjects." As citizens of the United States are excepted from the provisions of the extradition treaty with France, no grant to the President of discretionary power to surrender citizens of the United States can be implied from anything in the treaty. Accordingly, the President would have no power to extradite the two soldiers to Panama.

5. Accordingly, it was concluded and General Ridgeway was so informed on 24 April 1950 by Colonel Connally that the United States is under no obligation, pursuant to treaty or otherwise, to turn over to Panama American soldiers, citizens of the United States, who have committed the offense of armed robbery in the Republic of Panama.

6. A representative of this office (Maj. Downey, Ext. 3523) informally inquired of a representative of the Department of Justice (Mr. M. D. Kiefer, Ext. 523) concerning the practice of the United States in relation to such extradition procedures. Mr. Kiefer stated that the practice is dependent to a very large degree on the country requesting extradition. He stated that no extraditions are ever made to Mexico, and that in his opinion, under the facts stated above, the United States was under no obligation to surrender the soldiers to Panama. Attempt was made to contact Mr. Frederick Divens (Code 191, Ext. 5547) of the Department of State to whom such a question would be referred, but because of his absence information could not be secured from that source.

* * * * * * * * * * *

EXHIBIT V

The steps which the Respondents contend vested power in them to deliver Gerard to a foreign nation based on a purely political decision, are as follows:

FIRST STEP

The Security Treaty between the United States of America and Japan (T.I.A.S. 2491; 3 UST 3329) was signed on behalf of the United States by Dean Acheson, John Foster Dulles, Alexander Wiley, and Styles Bridges on September 8, 1951. It became effective on April 28, 1952. (See William S. Girard Case, Page 6, Hearings before Subcommittee of United States Senate Armed Services Committee held June 5, 1957.

Its principal purpose was to provide that the United States of America should maintain armed forces of its own in and about Japan so as to deter armed attack upon Japan (See Preface). It granted to the United States the right to dispose United States Military Forces in and about Japan (Article 1). It went on to provide for further implementation of this right as follows:

> "The conditions which shall govern the disposition of Armed Forces of the United States of America in and about Japan shall be determined by Administrative Agreement between the two governments." (Article III ..

SECOND STEP

An Administrative Agreement purporting to be signed under the authority of Article III of the Security Treaty (T.I.A.S. 2492; 3 UST 3341) was signed on behalf of the United States by Earl Johnson and Dean Rusk on February 28, 1952, and became effective on April 28, 1952. The signing was specifically authorized by the President of the United States. (Statement of Department of State, Hearings on H. J. Res. 309 and Similar Measures before the House Committee on Foreign Affairs, 84th Cong., 1st Sess., Pt.2, At P. 55.) (See William S. Girard Case, Hearings before Subcommittee of United States Senate Armed Services Committee held June 5, 1957, P.6).

At the time of the execution and the effectiveness of both of these instruments, the United States had exclusive jurisdiction over both its military and civilian personnel and its bases and other military areas reserved for military operations.

Article XVII of the Administrative Agreement suggests the United States to conclude with Japan an Agreement on criminal jurisdiction similar

to the provisions of the NATO Status of Forces Agreement.

There is nothing in the language of the Security Treaty that either expressly or impliedly authorize the inclusion of this part of Article XVII of the Administrative Agreement dealing with the Status of the troops. The words "the conditions which shall govern the disposition" which was to be made the subject of further Administrative Agreements were limited to the subject matter of the arrangement of them. The word "disposition" in this context is defined in Webster's Collegiate Dictionary, Fifth Edition, as follows:

> "The ordering or arranging of anything, or the state of being arranged, esp. systematically; as the disposition of draperies; the disposition of troops."

While this document is termed an "Administrative Agreement", it is in fact an Executive Agreement which in its essence purports to transfer sovereignty over citizens and property of the United States and to agree to the extradition of citizens of the United States to a foreign nation to whom such jurisdiction has been transferred. Its effect is to invade the long established Treaty making province and power provided for in the Constitution.

Since a Treaty is by nature a compact between sovereignties and when executed is a part of the municipal law of the land, it logically follows that a treaty is to be construed on principles similar to those applied to other written contracts and statutes, and the cognate Rules of International Law and of the legislation of the government may be considered. (52 Am. Jr. 822)

Santovincenzo v. Egan, 284 US 30, 76 L. Ed. 151, 52 S.Ct. 91; The Pizarro, 2 Wheat. (U.S.) 227, 4 L. Ed. 226; Tashiro v. Jordan, 201 Cal. 236, 256 p. 545, 53 Alr. 1279, Affirmed . 278 U.S. 123, 73 L. Ed. 214, 49 S. Ct. 47; Re. Ghio, 157 Cal. 552, 108 p. 516, 37 L.R.A. (N.S.) 549, 137 Am. St. Rep. 145, Affirmed in 223 U.S. 317, 56 L.Ed. 453, 32 S.Ct. 267; Re Anderson, 166 Iowa 617, 147 N.W. 1098, 52 L.R.A. (N.S.) 656, Affirmed in Etersen v. Iowa, 245 U.S. 170, 62 L. Ed. 225, 38 S.Ct. 109; Hamilton v. Erie R. Co. 219 N.Y. 343, 114 N.E. 399, Ann. Cas. 1918A 928, Writ of Error Dismissed in 248, U.S. 369, 63 L. Ed. 307, 39 S. Ct. 95; Trott v. State, 41 N.D. 614, 171 N.W. 827, 4 A.L.R. 1372.

The Agreement between the parties to the North Atlantic Treaty regarding the status of their forces (T.I.A.S. 2846; 4 U.S.T 1792) became effective

on August 3, 1953, between the United States and Belgium, France, The Netherlands, and Norway.

THIRD STEP.

Thereafter, in compliance with requests by Japanese authorities for fulfillment of the purported commitment contained in Article XVII, the Amendment of Article XVII of the Administrative Agreement under Article III of the Security Treaty (T.I.A.S. 2848; 4 UST 1846), which Amendment purportedly established the present criminal jurisdiction formula based on that contained in the NATO Status of Forces Agreement, was on September 29, 1953, signed by John M. Allison, United States Ambassador to Japan, on behalf of the United States. It entered into force in October 29, 1953.

This purported further Amendment of the Security Treaty is entitled "Protocol to Amend Article XVII of the Administrative Agreement Under Article III of the Security Treaty Between United States and Japan."

Black's Law Dictionary, Third Edition, defines "Protocol" as follows:

> "The first draft or rough minutes of an instrument or transaction; the original copy of a dispatch, Treaty, or other document. Brande. A document serving as the preliminary to, or opening of, any diplomatic transaction."

This purports to relinquish the complete criminal jurisdiction in Japan of United States over its personnel there and to transfer jurisdiction over all civilian personnel and certain military personnel to Japan. It further purports to transfer primary jurisdiction to Japan of certain offenses of military personnel.

There is no evidence in the record that this Agreement was either authorized or approved by the President of the United States and it is admitted that it was never submitted to the Senate for its concurrence in accordance with the requirements of Article II, Section 2, of the United States Constitution.

Even though credulity was strained to a point of interpreting Article III of the Security Treaty so as to construe this section as authorizing the further amendment thereof to include the transfer of jurisdiction of United States over its citizens and military personnel to Japan, this document could not affect such an Amendment to the Security Treaty.

The obligations of a Treaty cannot be changed or varied except by the same formalities by which they were introduced, or at least by some act of as high an import and of as unequivocal an authority. (52 Am. Jur. 812).

The Amiable Isabella, 6 Wheat, (US) 1, 5 L. Ed. 191.

The pertinent part of this so-called Protocol is contained in Article XVII, Paragraph 3, which provides as follows:

"3. In cases where the right to exercise jurisdiction is concurrent the following Rules shall apply:

"(A) The Military authorities of the United States shall have the primary right to exercise jurisdiction over members of the United States Armed Forces or the civilian component in relation to

"(1) offenses solely against the property or security of the United States, or offenses solely against the person or property of another member of the United States Armed Forces or the civilian component or of a dependent;

"(11) offenses arising out of any act or omission done in the performance of official duty.

"(B) In the case of any other offense the authorities of Japan shall have the primary right to exercise jurisdiction.

"(C) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other state as soon as practicable. The authorities of the state having the primary right shall give sympathetic consideration to a request from the authorities of the other state for a waiver of its right in cases where that other state considers such waiver to be of particular importance."

FOURTH STEP

On the same date September 29, 1953, John M. Allison, Ambassador Extraordinary and Plenipotentiary of the United States of America, signed a further document entitled "Agreed Official Minutes Regarding Protocol To Amend Article XVII of the Administrative Agreement Between the United States of America and Japan."

Where a member of the United States Armed Forces or the civilian component is charged with an offense, a certificate issued by or on behalf of his commanding officer stating that the alleged offenses, if committed by him, arose out of an act or omission done in the performance of official duty, shall, in any judicial proceedings be sufficient evidence of the fact unless the contrary is proved. The above statement shall not be interpreted to prejudice

in any way Article 318 of the Japanese Code of Criminal Procedure. (Re. Paragraph 3 (A) (ii).

Article XXVI of the aforementioned Administrative Agreement contains the further pertinent provision.

"1. A joint Committee shall be established as the means for consultation between the United States and Japan on all matters requiring mutual consultation regarding the implementation of this Agreement. In particular, the Joint Committee shall serve as the means for consultation in determining the facilities and areas in Japan which are required for the use of the United States in carrying out the purpose stated in Article I of the Security Treaty.

"2. The Joint Committee shall be composed of a representative of the United States and of Japan, each of whom shall have one or more Deputies and a staff. The Joint Committee shall determine its own procedures, and arrange for such auxiliary organs and administrative services as may be required. The Joint Committee shall be so organized that it may meet immediately at any time at the request of the representative of either the United States or Japan.

"3. If the Joint Committee is unable to resolve any matter, it shall refer that matter to the respective governments for further consideration through appropriate channels."

There are only two members of the Joint Committee. One is selected by the Commanding General of the Far East Command as his representative and the other is the representative of the Japanese Government itself. They have a staff who sit with them, but the Joint Committee consists of only two men.

FIFTH STEP

Purporting to act pursuant to the authority vested in them under and by virtue of Article XXVI of the Administrative Agreement, the two members of the Joint Committee promulgated certain "Agreed Views" which are numbered 39 and 43, respectively, both of which relate to the matter of "official duty" and to the certificate of the Commanding Officer of the alleged offender.

Both of these so-called views were approved October 29, 1953, and are as follows:

"No. 39. The term 'Official Duty' as referred to in Paragraph 3(A) (ii) of the Protocol and Official Minutes relating thereto is understood to be any duty or service required or authorized to be done by Statute, Regulation, the Order of a superior or military usage.

"No. 43. The Certificate referred to in the Official Minutes relating to Paragraph 3(A) (ii) of the Protocol will be forwarded, upon request, by the

Commanding Officer of the alleged offender to the Chief Procurator of the District in which an offense arises. Ordinarily such request will be made immediately upon notification of arrest, and only in the uncommon case in which the question of official duty status becomes an issue. The foregoing will not preclude the forwarding of such Certificate in any event. This Certificate will be sufficient evidence of the fact of official duty status unless the contrary is proved. Any proof to the contrary shall be presented to the Joint Committee for consideration.

"Where it is considered by the Chief Procurator that such proof exists, immediate notification will be given to the Commanding Officer who issued the Certificate. Thereafter, notification will be given to the Commanding Officer within ten days as to whether or not the issue will be submitted to the Joint Committee, in order that final disposition of the case may not be unduly delayed. Any submission of such matters to the Joint Committee will be made expeditiously in every case." (See William S. Girard Case, pp. 18 and 19).

The invalidity of the last two steps in this five-stage self-investure of authority is too apparent to require comment.

It is under the purported amended language of the Agreed View that the Japanese claim for jurisdiction over the Petitioner is based. The reasoning of this claimed jurisdiction is set out in the testimony of Robert Dechert, General Counsel, Department of Defense, which is summarized as follows: The Japanese Authority claim that Japanese witnesses to the events of January 30, 1957, on the Weir Camp Maneuver Area have stated that the deceased woman, among a number of Japanese civilians, was enticed to approach the guard position of the Petitioner by reason of the fact that he had thrown out empty shell cases which they were picking up to re-sell for salvage and that he then wilfully and wantonly fired upon these Japanese civilians, thus causing the death of the deceased.

Mr. Dechert states:

"...Fundamentally, the Japanese claim was that although they admitted that he was on duty nevertheless a person who is on duty status may so far depart from the relation to his duty that he can't be considered on duty any longer. They said that Girard had gone outside his duty and in some cases they used harder words than that although in no case did they indicate that they thought he intended to hit the woman.

"They have used words like 'wilful' and 'wanton' and that kind of thing. They said that his acts were completely foreign to the duty that was assigned to him, of protecting the equipment, and they said that he enticed them on and then fired on them, and that such behavior was not duty at all, but that it was something else, even though officially he was on duty."

On the other hand, the Petitioner denies these allegations and asserts that he fired from the waist intending only to frighten the Japanese civilians and that the empty shell cartridge propelled from his gun merely for the purpose of making a noise, accidentally struck the deceased.

In a separate Affidavit of Robert Dechert, he admits the facts supporting Petitioner's claim that the area was under the exclusive jurisdiction of the military forces of the United States at the time of the incident. (See Affidavit of Robert Dechert, on file in this Court.)

The deceased and approximately thirty other Japanese civilians were trespassing on United States Government property with the intent of stealing or misappropriating United States Government property. The Petitioner was on guard duty under instructions to protect such property at the time of the incident under penalty of Court Martial for failing to do so. (Uniform Code of Military Justice, Articles 83 - 96).

Petitioner's Commanding Officer executed a Certificate as to official duty with the local Japanese authority which is quoted below. This Certificate was addressed and filed with the Chief Procurator, Maebashi District, Maebashi City, Honshu, Japan, on February 7, 1957.

> "...On 30 January 1957, 2nd Battalion, 8th Cavalry Regiment, was engaged in routine training at Camp Weir Range Area. Company F was conducting blank firing exercises. Specialist Third Class William S. Girard was instructed by his Platoon Leader to move near a position near an unguarded machine gun to guard the machine gun and items of field equipment that were in the immediate area. Girard, following instructions, moved to the designated position near the machine gun. While performing his duties as guard, he fired an expended cartridge case, as a warning, which struck and killed Sakai, Naka, Kami-Shinden, Somamura, Gumma Prefecture, who had entered the range area for the purpose of gathering expended cartridge cases.
>
> "2. The United States will exercise jurisdiction in this case, unless notification is given immediately that proof to the contrary exists.
>
> "3. Should this incident result in trial of the above individual by General Court-Martial, you will be notified of the date of trial in accordance with the provisions of Paragraph 45 of the above-mentioned Agreed Views."

Although under the language of the first paragraph of Paragraph 3 (f) (ii) of the Agreed Official Minutes No. 3, it was provided that this Certificate was sufficient evidence of the fact that the alleged offense arose out of an

act or omission done in the performance of official duty. The Japanese claim that the 2nd Paragraph of that provision rendered such language nugatory because Article 318 of the Japanese Code of Criminal Procedure provided in effect "The probative value of evidence shall be left to the free discretion of Judges." (See Testimony of Mr. Dechert, Page 16, Girard Case) .

Mr. Dechert in his testimony in the Girard Case before the United States Senate Committee, Pages 13 and 14, states the position taken by the Japanese authority in this instance to be as follows:

"Article 318 of the Japanese Code of Criminal Procedure says that the Judge shall be the final decider of facts. The Japanese interpret this as meaning that if a dispute arises as to the correction of the Certificate, by an attempt to prove the contrary by the Japanese, the final resolution of the fact as to whether the Certificate is right or the proof to the contrary is right must be made under Article 318 of the Japanese Code of Criminal Procedure by the local Japanese Court, acting through its judge.

"Senator ERVIN. It looks to me like that would give final say-so to the Japanese.

"Mr. DECHERT. The only step that would seem to prevent that is the thing which I read a few minutes ago from the Administrative Agreement, Article XXVI, Subsection 3, which says:

> 'If the Joint Committee is unable to resolve any matter, it shall refer that matter to the respective governments for further consideration through appropriate channels.'

"Conceivably such a negotiation between governments might go on so long that it would never reach the Japanese courts. But the Japanese have contended that the meaning of this Agreed Minute is exactly what you, sir, the Chairman, have just indicated.

"Senator ERVIN. It would seem to me that they have a reasonable basis for it, because that is subsequent to the original Agreement, and it would be perhaps construed to be a modification."

The Japanese claim to determine the issue of whether or not the petitioner acted within the scope of his guard duty is based upon the language contained in Paragraph 3(a) (ii) of the Protocol of September 9, 1953, which provides:

> "(ii) The military authorities of the United States shall have the primary right to exercise jurisdiction over members of the United States Armed Forces or the civilian component in relation to

"(ii) offenses arising out of any act or omission done in the performance of official duty."

as amended by the language contained in the document entitled "Agreed View", as previously set forth

This purported Amendment to the Protocol is the predicate upon which the Japanese claim is based. (See Testimony of Mr. Dechert, Girard Case pp. 16 to 22)

The provisions of Agreed View No. 43 have the effect of depriving the Petitioner of having the question of whether or not his act was done in performance of his duty as a soldier in the United States Military Army.

The provisions of Article XXVI, Par. 3, of the Administrative Agreement of February 28, 1952, and of Agreed View No. 43 of the Joint Committee, therein referred to, have the effect of depriving the Petitioner of his right to determine whether or not the act complained of justifiably arose out of or was in the course of his duty assignment.

The Petitioner has an inalienable right as a citizen of the United States to have this question determined by the Government of the United States through its courts and to deprive him of this right is a violation of the United States Constitution. This Constitutional right to have such an issue determined by the Government of the United States is protected as to both civil or criminal prosecution.

"A civil or criminal prosecution in a court of a state of the United States against a member of the Armed Forces of the United States on account of an act done under color of his office or status, or in respect to which he claims any right, title, or authority under a law of the United States respecting the Armed Forces thereof, or under the law of War, may at any time before the trial or final hearing thereof be removed for trial into the District Court of the United States for the District where it is pending in the manner prescribed by law, and it shall thereupon be entered on the Docket of the District Court, which shall proceed as if the cause had been originally commenced therein and shall have full power to hear and determine the cause." Added Aug. 10, 1956, c, 1041, par. 19 (A) 70A Stat. 626. (Par. 1442A, Judiciary - Procedure)

When even the states of the United States are prohibited from determining such an issue, it is no answer to say that assurances have been obtained from Japan or any other foreign nation as to the fundamental safeguards for a fair trial. The issue is not the fairness or unfairness of foreign court. The issue is that a citizen of the United States, acting as an Agent of the United States, in the performance of his duty to the United States, has both the logical and inalienable legal right to have the issue as to whether or not any act performed by him under claim of authority of the United States determined in the courts of the United States and those courts alone. (Fifth Amendment, Constitution)